HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.272 of 2001

APPELLANTS/: (Convicts) Nani-Babu @ Paul & others

- Versus -

RESPONDENT: The State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

I agree.

Sd/-
Sunil Kumar Sinha
Judge

POST FOR JUDGMENT ON 21ST AUGUST, 2007

Sd/-

(VII)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.272 of 2001

APPELLANTS/: (Convicts)	1.	Nani-Babu @ Paul, S/o Dhobalu, age 18 years.
	2.	Khairu @ Saul, S/o Dhobalu, age 26 years.
	3.	Dhoie @ Kamal Singh, S/o Sundar Ram, age 21 years.
		No.1 & 2, R/o Nayamunda Para, Jagdalpur, District – Bastar (C.G.)
		No.3 R/o Akash Nagar, Frejarpur, Jagdalpur, Dist – Bastar (C.G.)

- Versus -

RESPONDENT: The State of Chhattisgarh.

{Appeal under Section 374 (2) Criminal Procedure Code}

Present: -

Mr. R.N. Jha, Advocate: For the appellants.

Mr. Satish Gupta, Deputy Govt. Advocate: For the State/respondent.

Coram: - Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 21st August, 2007)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J***: -

1. The appellants have preferred this appeal against the judgment of conviction and order of sentence dated 20th January, 2001 passed by the Additional Sessions Judge & Special Judge, Jagdalpur in Sessions Trial No.114/2000, whereby learned Additional Sessions Judge after holding accused/appellant Nani @ Paul guilty for commission of offence under Section 302 of the I.P.C. and accused/appellants Khairu @ Saul & Dhoie @ Kamal Singh under Section 302 read with Section 34 of the I.P.C. for committing the murder of Kunu @ Kundan, sentenced each of the accused persons to undergo imprisonment for life.

2. Case of the prosecution, in brief, is that there was old animosity between accused Nani @ Paul and Kunu @ Kundan (since deceased). On 25th December, 1999 at mid day, accused Khairu went to the house of Kunu (deceased) and called him saying that let us go and celebrate Christmas festival. They went to the place of incident, where the quarrel started between the accused persons and the deceased. Accused Nani @ Paul attacked the deceased with sword, whereas accused Kamal attacked with club and Kheru with hands. The incident was witnessed by Shridhar (PW-2) & Kanak Bai (PW-3). Mother of the deceased namely, Neela Bai (PW-4) was informed about the incident by one Gabrel. Shridhar took Kunu @ Kundan to Maharani Hospital, where Kunu succumbed to the injuries sustained by him. The matter was reported by Neela Bai, mother of the deceased, under merg intimation Ex.P-4 and first information report Ex.P-3. After registering the case, the Investigating Officer took up investigation. He left for the scene of occurrence, seized plain soil, blood stained soil and wooden Batta under Ex.P-6. Shirt of accused Paul was seized under Ex.P-7. In pursuance of memorandum Ex.P-10, given by accused Kamal, one club was seized under Ex.P-8 at his instance. In pursuance of memorandum Ex.P-11 given by accused Nani, sword, the weapon of offence, was seized under Ex.P-5 at his instance. The Investigating Officer prepared inquest report Ex.P-14 on the body of Kunu @ Kundan. Post-mortem on the body of Kunu @ Kundan was conducted by Dr. Virendra Kumar Thakur (PW-6) who opined that cause of death was syncope due to excessive haemorrhage through cut because of stab injury and the death was homicidal in nature. Seized articles were sent for Forensic Science Laboratory, Raipur for chemical examination from where the report was received.

3. After completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Jagdalpur, who in turn committed the case to the Sessions Judge, Jagdalpur, from where learned Additional Sessions Judge received the case on transfer for trial.

4. The prosecution in order to establish charge against the accused persons examined seven witnesses. Statements of the accused persons under Section 313 of the Cr.P.C. were recorded by learned Special Judge in which the accused persons denied the material appearing against them in

the prosecution evidence and stated that they are innocent, they have been falsely implicated in the crime.

5. Learned Special Judge after hearing counsel for respective parties, convicted and sentenced the accused persons as aforesaid.

6. We have heard Mr. R.N. Jha, learned counsel for the appellants and Mr. Satish Gupta, learned Deputy Govt. Advocate on behalf of the State/ respondent.

7. Mr. Jha has not disputed the homicidal death of Kunu @ Kundan. Moreover, Shridhar (PW-2) has categorically stated in his evidence that accused Nani @ Paul had attacked the deceased with sword on left side of chest. Dr. Virendra Kumar Thakur (PW-6) has stated in his evidence that there was a stab injury on left side of chest in the size of 1½" x 2 cms. x 8" and incised wound on ring finger of right hand in the size of 3½" x ½ cm. On opening the body it was found that there was a cut injury in the size of 1½" on pericardium part of heart, both the chambers of heart were cut in the size of 1½", the death was on account of haemorrhage and was homicidal in nature. In view of the ocular and medical evidence, it is established that the death of Kunu @ Kundan was homicidal in nature.

8. As far as complicity of the accused persons in the crime in question is concerned, Shridhar (PW-2) has stated in his evidence that on the fateful day at about 2 p.m. he saw that there was quarrel in the open field in front of his house, accused Paul @ Nani, Kamal Singh & Khairu were attacking Kundan, Nani was holding sword, Kamal Singh was holding club and Khairu was empty handed. Khairu caught hold of Kundan, Nani & Kamal Singh were assaulting Kundan with sword & club, respectively. Kundan sustained injury on chest. In cross-examination, he has stated that Kamal was holding Kundan with two hands and at that time, there was no Lathi in his hand. Khairu & Kamal caught hold of Kundan, whereas Nani attacked Kundan on chest as a result of which Kundan fell down and the accused persons ran away. He (Shridhar) took Kundan to Maharani Hospital in his rickshaw.

9. Kanak Bai (PW-3) has stated in her evidence that the accused persons and the deceased are known to her, Paul @ Nani was holding sword, he attacked Kundan on his chest. Other accused persons were hiding, she did not see accused Kamal & Khairu. The incident took place on the day

of Christmas. This witness has been declared hostile. In cross-examination by defence counsel, she has stated that only Paul @ Nani attacked Kundan on his chest with sword, Khairu & Kamal were not present there, as a result of the assault made with sword, Kundan fell down, she raised cries. Shridhar was present there. Neela Bai (PW-4) is mother of the deceased, she is not an eyewitness.

10. Mr. Jha, learned counsel for the appellants, argued that as far as accused Khairu is concerned, there are no allegations against him that he attacked the deceased in any manner with any weapon. Moreover, allegations against accused Kamal are also not established because it has been stated that he attacked with club, but no injury on the body of deceased Kunu @ Kundan was found to have been caused by any blunt object. He also submitted that as per the evidence of Kanak Bai (PW-3) who witnessed the crime, the attack was made by Nani @ Paul with sword, Khairu & Kamal have not attacked. Therefore, the evidence of Shridhar (PW-2) cannot be believed to the extent that Khairu & Kamal also participated in the attack because no injury was found on the body of Kunu @ Kundan caused by club.

11. On the other hand, Mr. Gupta, learned Deputy Govt. Advocate supported the judgment of the trial Court.

12. Accused Khairu & Kamal have been convicted under Section 302 of the I.P.C. with the aid of Section 34 of the I.P.C. To substantiate a charge under Section 302 with the aid of Section 34, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of the both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance.

13. There is no straight jacket formula for applying the principle of common intention. The inference therefor must be drawn from the totality of the facts and circumstances of each case. It is difficult to find out two similar

cases. In the matter of **Suresh & Anr. vs. State of U.P.**[1], the Apex Court held:

> "Thus to attract Section 34, IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
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> Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case."

14. Again in the matter of **Lallan Rai @ Ors. v. State of Bihar**[2] and in the matter of **Ramaswami Ayyangar vs. State of T.N.**[3] the Apex Court held:

> "A plain look at the statute reveals that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It is trite to record that such consensus can be developed at the spot. The observations above obtain support from the decision of this Court in Ramaswami (supra).

15. Applying the legal principles annunciated by the Apex Court, we are of the considered opinion that common intention on the part of appellants Khairu & Kamal has not been established for the reason that as per the medical evidence of Dr. Virendra Kumar Thakur (PW-6), two injuries were found on the body of Kunu @ Kundan, one was stab wound on left side of

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[1] (2001) 3 SCC 673
[2] (2003) 1 SCC 268
[3] AIR 1976 SC 2027

chest and another was incised wound on ring finger of right hand, both the injuries were caused by sharp & hard object. Therefore, the evidence of Shridhar (PW-2) that Kamal attacked Kundan with club does not find corroboration from the medical evidence, nor the evidence of Shridhar has been corroborated by Kanak Bai (PW-3) who has stated that only Nani attacked the deceased with sword. In the circumstances, the evidence of PW-2 to the extent that Kamal & Khairu were sharing intention with Nani in the attack does not inspire confidence.

16. It is admitted position that Khairu was unarmed, if he was sharing intention with accused Nani to commit the murder of Kundan, then he ought to have come prepared with any arm. Moreover, Shridhar (PW-2), the only eyewitness, in examination-in-chief has stated that all the accused persons viz., Nani @ Paul, Khairu @ Saul & Dhoie @ Kamal Singh were beating Kundan, Kamal attacked him with club, Khairu was empty handed and was holding Kundan, Nani & Kamal were attacking with sword & club. Thereafter, he has stated that Khairu & Kamal caught Kundan and Nani attacked him on chest. But this part has not been corroborated by any other independent witness. Moreover, Neela Bai (PW-4), mother of the deceased, was informed by one Gabrel, who has not been examined by the prosecution. Therefore, there is no cogent and clear evidence on record to establish that Khairu & Kamal were sharing intention with Nani to commit the murder of Kundan.

17. As far as the evidence of Shridhar to the extent that accused Paul @ Nani attacked the deceased with sword has been corroborated by the evidence of Kanak Bai (PW-3). Moreover, the sword in question, the weapon of offence, was recovered at the instance of the accused and as per the F.S.L. report, blood was found on the sword, even blood was found on the shirt of accused Paul @ Nani.

18. Therefore, conviction of accused Khairu & Kamal Singh with the aid of Section 34 of the I.P.C. cannot be sustained, because, the prosecution has not been able to establish with cogent, legal and clinching evidence that these two accused persons were sharing common intention with accused Nani @ Paul to cause the death of Kunu @ Kundan. In the circumstances, conviction and sentence imposed upon Khairu & Kamal Singh under Section 302 read with Section 34 of the I.P.C. cannot be sustained.

However, as far as conviction of accused Paul is concerned, we do not find any illegality or infirmity in the finding of the trial Court.

19. In the result, the appeal in respect of Khairu & Kamal Singh succeeds, conviction and sentence imposed upon them under Section 302 read with Section 34 of the I.P.C. are set aside and they are acquitted of the said charge. They are on bail, therefore, their bail bonds are discharged. The appeal in respect of accused Nani @ Paul fails, same is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

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